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**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

NEW ORLEANS STEAMBOAT COMPANY

and

ROBERT E. LEE, INC.,

Petitioners

VERSUS

M/T EXXON BALTIMORE, ETC., ET AL,

Respondents

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a 63,000 ton tanker, fully loaded, can commit multiple statutory violations of the Rules of the Road, thereby threatening the safety of the City of New Orleans, without being found solely at fault for the consequences of its errors in navigation?

2. Whether a District Court is allowed to deduct the speed of the current of the river from the speed through the water of an upbound ship and add it to the speed of the downbound ship so that both can be said to be navigating at the same speed, when established case law of the Fifth Circuit prescribes otherwise?

3. Whether a bridge bell book entry and radio message, both given simultaneously at the moment of collision, can be subsequently altered to reflect an opposite statement?

STATEMENT OF INTERESTED PARTIES

The parties having an interest in the outcome of this case, pursuant to Rule 21.1(b) of the Rules of the Supreme Court, are listed as follows:

1. New Orleans Steamboat Company
2. Robert E. Lee, Inc.
3. Exxon Corporation
4. Exxon Transportation Co.
5. Royal Globe Insurance Company of New York
6. Marine Office of America Corp.
7. St. Paul Fire & Marine Insurance Co.
8. New York Marine Managers, Inc.
9. Certain Lloyds and London Insurance Companies.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, New Orleans Steamboat Company and Robert E. Lee, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 27, 1982.

OPINIONS BELOW

The Court of Appeals rendered no written opinion, and the opinion of the District Court was affirmed without

opinion. Copy of the opinion of the District Court and the judgment of the Court of Appeals are attached to the appendix herein.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 27, 1982. A timely petition for rehearing en banc was denied on February 7, 1983, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S. Code §1254.

TEXT OF AUTHORITIES INVOLVED

SPEED IN FOG, Art. 16 (33 USC 192). "Every vessel shall, in fog, mist, falling snow, or heavy rainstorms go at moderate speed, having a careful regard to the existing circumstances and conditions...."

GENERAL PRUDENTIAL RULE, Art. 27 (33 USC 212). "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and those special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

THE PRECAUTIONARY RULE, Art. 29 (33 USC 221). "Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof from the consequences or any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of any neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

STATEMENT OF THE CASE

On the rainy and overcast afternoon of March 29, 1980, in conditions of visibility considerably limited by severe isolated thunderstorms producing strong winds and heavy rains, the EXXON BALTIMORE, a huge tanker of over 63,000 tons, fully loaded with North Slope Crude, still containing all its volatiles of gasoline and naptha, turned upriver around Algiers Point in the Mississippi River through New Orleans Harbor, one of America's busiest waterways, at a speed in excess of 16 m.p.h. through the water, little less than her maximum sea speed.

Those on the bridge of the tanker could see the Greater New Orleans Bridge one mile ahead but not above the bridge where a heavy squall was passing and into which her radar could not penetrate. Conditions had made radio useless; the tanker could not communicate with the Governor Nicholls control tower when she was right under it moments before.

The pilot in charge of the EXXON BALTIMORE knew the Passenger Excursion Vessel NATCHEZ was up ahead of them, though they could not see her, and that she would be returning to her berth on the New Orleans side of the river, a two whistle (starboard to starboard) passing.

The EXXON BALTIMORE was headed for the green lights at the center of the bridge and was only two ship lengths below the bridge (she is 743 feet long), still at full speed when she sighted a "white block", which later turned out to be the NATCHEZ coming out of the squall. The NATCHEZ was moving at half speed, bare steerage-way with the strong 5 m.p.h. current behind her.

The EXXON BALTIMORE blew a one blast signal and immediately put her rudder 10 degrees right before she received an assent. She then heard the NATCHEZ blow a two blast signal. With the strong current on her port bow, still at full ahead and unable to reverse that right turn, Captain Pizani, the pilot of the EXXON BALTIMORE, had lost control of his ship. The EXXON BALTIMORE then went 20 degrees right rudder, attempting to squeeze between the NATCHEZ and the bridge pier, which she missed by 10 feet, then turned hard left to keep from going ashore.

The tanker had swung 27 degrees to her right, according to the chart of her course recorder, when she struck the NATCHEZ with the bluff of her bow. From her one blast signal to collision, the recorder showed, as read by her second officer in charge of the instrument, that *this swing took place in less than one minute*, all at full speed ahead. When the NATCHEZ saw the sudden turn of the tanker across her bow, she blew an alarm signal and went flank astern, with her rudders amidships for maximum thrust astern, until collision and for some seconds afterwards until she had finally backed clear. The EXXON BALTIMORE thus preempted one-half of the river and gave the NATCHEZ no room to maneuver in the less than one minute she had to avoid a collision.

On April 28, 1980 New Orleans Steamboat Company and Robert E. Lee, Inc., filed suit in the United States District Court for the Eastern District of Louisiana against Exxon Transportation Co. and the Motor Tanker EXXON BALTIMORE, seeking recovery of damages sustained to plaintiffs as a result of the collision of the M/T EXXON BALTIMORE and the S/S NATCHEZ in New Orleans Harbor on March 29, 1980. Suit was filed by Exxon Corporation against New Orleans Steamboat Company,

Robert E. Lee, Inc., and the S/S NATCHEZ on May 6, 1980, seeking recovery of damages from the same collision. The suits were consolidated for trial. Prior to trial, Exxon Corporation was substituted as defendant in the original suit, and Exxon Transportation Co. was dismissed without prejudice; Exxon Corporation stipulated that it would answer in damages for any fault found against the EXXON BALTIMORE, her officers, and owners.

Issues of quantum and liability were severed by the District Court, and trial was held on the issue of liability, commencing February 9, 1981 and ending February 19, 1981. Judgment was entered on November 16, 1981 in which the District Court apportioned fault and gave judgment apportioning liability 60% on the part of the NATCHEZ and 40% on the part of the EXXON BALTIMORE.

Notices of Appeal were filed by Exxon Corporation on November 25, 1981 and by New Orleans Steamboat Company and Robert E. Lee, Inc. on November 30, 1981. Oral argument was heard on December 8, 1982 before a three-judge panel of the Court of Appeals, consisting of Clark, Chief Judge, and Thornberry and Politz, Circuit Judges. On December 27, 1982 the panel affirmed the District Court without giving reasons in accordance with Local Rule 21.

Motion for Rehearing with Suggestion for Rehearing En Banc was filed on January 18, 1983. This motion was denied on February 7, 1983.

REASONS FOR GRANTING THE WRIT

The conduct of the EXXON BALTIMORE created a potential for unprecedented disaster so as to be of major

concern to this Court and the law of the United States. The importance of this decision to the City of New Orleans, now the busiest port in this country, or to some of the other extremely busy and crowded harbors in the United States, can hardly be overestimated. At the speed this huge ship was traveling, fully loaded with a highly combustible petroleum product, she was unable to use her anchors or put her engines astern because of this speed, according to her pilot, Pizani. He missed the bridge abutment by 10 feet and when asked why he didn't go astern and use his anchors, he replied:

"THE WITNESS: Full astern would have been a disaster.

THE COURT: What would that have done?

THE WITNESS: Your Honor—

THE COURT: I mean—let me ask this: Why would it have been a disaster?

THE WITNESS: Your Honor, she would have automatically backed her bow to the right. She could have went through the city docks, busted the protection levy, flooded the City of New Orleans, probably got the bridge pier, and at 4:30 in the afternoon, bumper-to-bumper traffic, how many people would have drowned...."

As found by the Trial Court in its opinion, Page 19, Conclusions of Law XI,

"Pizani chose to try to get through between the NATCHEZ and the bridge pier at full speed ahead; he blew an alarm and repeated his previous one blast signal and ordered 20 degrees

right rudder, causing his vessel to come dangerously close to the bridge and *nearly causing the worst disaster this City could imagine....*" (Emphasis added)

If the present posture of this case is allowed to stand, there is little or no incentive and no compulsion at all on the part of United States Courts to hold the pilots and masters, who ever more frequently traverse its often narrow and ever more crowded waters, to adhere to the caution and care running through all the rules seeking safe navigation under all conditions. Our present urge for haste in all pursuits should receive a timely warning from this court. Our waterways are getting no larger, but the ships that use them are, and more powerful and faster each year. The need for care and caution, not haste, is the lesson all must learn for the protection of those who look to our courts, and those who practice before them, for such protection as their wisdom may provide.

In apportioning damages, the courts below mechanically interpreted *United States v. Reliable Transfer Co.*, 421 U.S. 397, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975), which holds,

"...that when two or more parties have contributed by their fault to cause property damage in a marine collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault...." 421 U.S. at 411.

The Trial Court discussed the navigation errors of the two vessels and found fault on both vessels. Significantly, no consideration was given to the dangers of catastrophe presented by the actions of the EXXON BALTIMORE. Assuming, arguendo, that the maneuvers of the EXXON

BALTIMORE constituted only 40% of the fault contributing to the collision; nevertheless, the EXXON BALTIMORE's proportion of fault should have been greater because of the possibility of enormous damage presented by the EXXON BALTIMORE. The actions of the EXXON BALTIMORE called for a higher degree of care, and the violations of that higher degree of care should result in a higher proportion of liability. The rule of *Reliable Transfer* is inadequate to deal with the problems presented in this case, and the rule should be modified.

Sixteen miles per hour in a crowded harbor in limited visibility is clearly excessive and a multiple statutory violation. This Court should unequivocally state to maritime interests that where multiple statutory violations place an entire city in jeopardy, the offender will be found solely at fault.

In severely limited visibility, the EXXON BALTIMORE admittedly traveled 16 m.p.h., or at 85 r.p.m. through the narrow and busy harbor of New Orleans. Her maneuvering full speed ahead called for 80 r.p.m. Nevertheless, a speed of 85 r.p.m. was admittedly maintained up to and through collision and until a minute thereafter. These are statutory violations to which the Rule in *The PENNSYLVANIA* applies:

SPEED IN FOG, Art. 16 (33 USC 192). "Every vessel shall, in fog, mist, falling snow, or *heavy rainstorms go at moderate speed, having a careful regard to the existing circumstances and conditions....*"

GENERAL PRUDENTIAL RULE, Art. 27 (33 USC 212). "In obeying and construing these rules due regard shall be had to *all dangers of naviga-*

tion and collision, and those special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

THE PRECAUTIONARY RULE, Art. 29 (33 USC 221). "Nothing in these rules shall exonerate any vessel or the owner or master of crew thereof from the consequences or any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of *neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.*"

The following Fifth Circuit cases require moderate speed in limited visibility and/or in a harbor:

O/Y Finlayson-Forssa A/S v. Steamship ANTIPOUS, 259 F.2d 11, 1958 AMC 2070 (5th Cir. 1958).

On the question of speed, the court said,

"....We need not minutely examine the evidence on speed. The court below fixed this at 7.1 kts (knots through the water). As thus fixed it was, in our view, an immoderate speed. We agree, however, generally with cargo that this was the irreducible minimum and there is much to indicate that speed was actually greater...."

At 85 r.p.m., the EXXON BALTIMORE was doing 14.25 knots, or a little over 16 m.p.h. against a 5 mile current.

Socony Vacuum Oil Co. v. Smith, 1950 AMC 445, 179 F.2d 672 (5th Cir. 1950), 7 m.p.h. speed limit

in Sabine-Neches Canal, tanker did 13 m.p.h., held solely at fault.

"....And it is apparent the sheer would not have occurred had it not been for the high and dangerous rate of speed which the SACHEM maintained right up to the moment of impact. This and this alone, in the Court's view, was the proximate cause of the disaster." 179 F.2d at 674.

Mississippi Valley Barge Line v. Esso Shipping, 1957 AMC 733, 240 F.2d 606 (5th Cir. 1957). Tanker turning 90 r.p.m., giving her a speed of 17.23 m.p.h. into collision, and not going full astern. This held to be too high a rate of speed for a deep draft vessel in restricted waters. (Open river about 75 miles above New Orleans. Visibility unimpaired by weather factors.)

In *California Transport Corp. v. Tug ACCENTOR*, 1961 AMC 926, 183 F.Supp. 817 (E.D.La. 1960), *aff'd*, 289 F.2d 822 (5th Cir. 1961), the Fifth Circuit affirmed an opinion by Judge J. Skelly Wright that resembles the case at bar in many respects.

An upbound "super-tanker", the GAGE LUND (the EXXON BALTIMORE is half again as large), entered the New Orleans Harbor at the same point the EXXON BALTIMORE did and though the night was clear, proceeded at half speed, 7 knots against 2 knot current and into collision. The court held this to be too great a speed in a narrow harbor where such a vessel may meet, and did, other vessels at any time moving in any direction, as did the EXXON BALTIMORE. The court went on to say that other and smaller vessels than large tankers have the same right to use the Nation's waterways.

Lastly, and again from *O/Y Finlayson, supra*,

"...When a plain statutory command is violated on the uncontradicted story of the vessel's own witnesses stated most favorably to her cause, she cannot escape the consequences because fault of the other may be more glaring, more flagrant, or more shocking. Her last clear chance to extricate herself is to show that the statutory fault not only did not, but could not possibly have, caused collision. *The PENNSYLVANIA, supra*. That heavy burden cannot be met here." 259 F.2d at 22.

The tanker's sudden right turn was admittedly made at full speed without any agreement with the other vessel. This was foolhardy and dangerous.

A passing signal of one or two blasts is a request for agreement, not an order to the other ship. The speed of the vessel blowing it must be such that allows sufficient time to come to an agreement *before* there is danger of collision.

The EXXON BALTIMORE, while traveling at full speed, first saw the NATCHEZ when the EXXON BALTIMORE was one-quarter of a mile from the Greater New Orleans Bridge under which the collision took place. A one blast signal was blown and the helm put 10 degrees right, then 20 degrees right, and then hard left. No assent was ever received from the NATCHEZ. The EXXON BALTIMORE turned 26 degrees to her right (not six degrees as appeared in the opinion, a typographical error) and then hard left to break her swing. The collision occurred at the end of the right swing *less than one minute* and just two ship lengths from the time the NATCHEZ was sighted, as read on her course recorder tape by her second officer who

made the tape. In this fraction of a minute, the NATCHEZ had neither time to cause or avoid a collision. The trial court found the NATCHEZ was going full speed astern prior to impact and the EXXON BALTIMORE still going full speed ahead.

The courts have always held that passing signals must be agreed upon before either vessel changes its course.

In *Nat. Motorship Corp. v. U.S.*, 171 F.2d 413 (2d Cir. 1948), the facts were almost identical to the case at bar. A ship traveling at full speed met another and blew one blast and turned right. The other vessel replied with two blasts. The first vessel blew one blast a second time, continued her right turn, and went into collision at full ahead, precisely as did the EXXON BALTIMORE. Chase, C.J., there said,

"The first vessel was a priori under the duty to hold back out of dangerously close quarters until she had assurance that the indicated disagreement was over and cooperation in passing could be had.."

As the trial court said in this case:

"Once Pizani gave the order for a 10 degree turn, however, it was too late to check the swing with the strong current on their port bow as the EXXON BALTIMORE had responded very quickly to the 10 degree right rudder order. By then the EXXON BALTIMORE was swinging with the strong current on her port bow; to attempt to reverse her swing at that point might only have put her bow into the NATCHEZ. Pizani chose to try to get through between the NATCHEZ and the bridge pier at full speed ahead; he blew one alarm and repeated his previous one blast signal

and ordered 20 degrees right rudder, causing his vessel to come dangerously close to the bridge and nearly causing the worst disaster this City could imagine. *The mistake that Pizani made was blowing the one blast and going 10 degrees right before receiving an assent.* Under the conditions which existed at the time, when the EXXON BALTIMORE saw the NATCHEZ, *she should have reduced her speed immediately, if not sooner, to something less than full ahead.* When Pizani heard the two whistle blast from the NATCHEZ, it was too late for him to change his course *because his speed was so excessive."*

* * *

"This speed by the EXXON BALTIMORE of over 10 miles per hour over the bottom in restricted visibility and heavy traffic that existed at that time and place was grossly negligent and a statutory violation which this Court finds to be a proximate cause of the collision." (Emphasis added)

The following Fifth Circuit case is on point: *Parker Brothers v. J. E. DeForest*, 1955 AMC 786, 221 F.2d 377 (5th Cir. 1955), in good visibility, held the tug at fault for (a) attempting to pass without receiving an assent to her one blast signal, (b) failure to reduce speed or to blow a danger signal until too late to avoid a collision, were statutory faults. There is no right of way into a collision; damages divided for lack of a lookout on the other ship.

The court below subtracted the current from the speed of the upbound ship and added it to the speed of the downbound ship and concluded that they were both traveling at the same speed. This finding was contrary to the established law and the Court of Appeals was in error in affirming the Trial Court.

In limited visibility, vessels are to set their respective speeds as if they were both moving in still water.

The Fifth Circuit had this very question before it in *O/Y Finlayson-Forssa A/B v. Pan Atlantic Steamship Corp.*, 259 F.2d 11 (5th Cir. 1958). The Court there held that, as *both the ascending and descending vessels were moving in a common body of water affecting both vessels substantially alike, the assumed current was not to be deducted from the speed through the water of the ascending vessel* in determining whether that vessel was traveling at a moderate speed. The Court there quoted the well-known English authority as follows:

“....Marsden’s *Collision at Sea*, 10th Ed. 1953, p. 479-480. It has been well put: ‘That is to say, it is the duty of a vessel to proceed in a fog at a moderate speed, both with respect to moving and to anchored vessels. That she is proceeding at a moderate rate of speed over the ground will not free her from blame, if, proceeding immoderately through the water, she strikes a vessel under way. That she is proceeding moderately through the water will not excuse her, if, proceeding immoderately over the ground she strikes a vessel properly anchored.’” *Yarmouth* (D.C.Mass.), 100 Fed. 667, 671. We do not regard *Silvanus* (D.C.La.), 1932 AMC 154, 56 F.(2d) 257, *aff’d* (5 Cir.), 1933 AMC 1211, 66 F.(2d) 113, to the contrary.” 259 F.2d at 21.

In *LILLIAN ANN-PENNSYLVANIA*, 1934 AMC 569, 571 (2d Cir. 1934), *cert. denied*, 293 U.S. 575, 79 L.Ed. 673 (1934), Judge Learned Hand, the court had the same question before it and held that “both vessels are to proceed as though they were navigating in slack water”. The Supreme Court thus approved of the rule and has not had

to deal with it since.

This error was made in Findings of Fact XI and XII and repeated in Conclusions of Law XII and XIII. The incorrect legal standard by which they were arrived at deprives them of any standing. When a fact-finder has failed to employ the proper legal standard in making its determination, the finding may not stand. *Ferran v. Flemming*, 293 F.2d 568 (5th Cir. 1961), and the dissent of Judge Brown in *Perkins v. State of Miss.*, 455 F.2d 7, 12-13 and 46, where all the Fifth Circuit cases on this point and to that date were collected. The correct computation of speed results in the EXXON BALTIMORE steaming at 16 m.p.h. through collision and the NATCHEZ steaming at 6 m.p.h. before she put her engines full astern. Thus, the Trial Court was clearly erroneous in finding the speed of the NATCHEZ excessive. A finding that the NATCHEZ was proceeding at a moderate and prudent speed cannot support a finding of fault on the NATCHEZ.

The altered bridge bell book, copied into the log book in its altered form, is the best evidence of the truth of the original entry. At the moment of collision, the second officer of the EXXON BALTIMORE made the following entry in the ship's bridge bell book,

"Struck vessel NATCHEZ under Greater New Orleans Bridge."

Simultaneously, the pilot, Pizani, radioed the Coast Guard,

"Yeah, we just clobbered the NATCHEZ."

Only on cross-examination of the second officer was it admitted that when the vessel had anchored after the

collision, he was instructed by the master to alter the bell book by inserting the word "by" in such manner that the entry read,

"Struck by vessel NATCHEZ under the Greater New Orleans Bridge."

This altered entry in the bell book was then copied into the deck log book word for word. These false entries were never mentioned on direct examination by either the master or second officer who made them but only detected and then admitted on cross-examination through the difference in color density brought out by a photostat.

It is contrary to the holding of all cases on the point, in both England and the United States, to countenance any alteration of a ship's bell book or log book.

The Rule in the Fifth Circuit, Judge Foster of that court with Judges Hutcheson and Bryan, in *The GEORGIAN*, 76 F.2d 550 (5th Cir. 1935), dealt with this same point as follows:

"A vessel's log book is perhaps the most important document among her papers and the owner is bound by entries made therein by the ship's officers. It may be *conclusively presumed* that the chief mate would not have made the entry unless he believed it to be true...." (Emphasis ours).

See also, The CHICAGO, 94 F.2d 754, 1937 AMC 1427, 1442 (9th Cir. 1937), where Judge Denman wrote:

"The importance of log entries in determining marine causes has always been recognized by courts of admiralty. The alteration of log books

(bridge bell book here followed by the log book) by erasure and substitution***has long been condemned in courts of admiralty. It only casts suspicion on the whole case of the vessel, but creates a strong presumption that the erased matter was adverse to her contention. *The ERNEST H. MEYER* (Broughton & Wiggins Navigation Co. v. Hammond Lumber Co.) (C.C.A.9) 84 F.(2d) 496, 503, 504 (erasure and substitution of entries); *Cary-Davis Tug & Barge Co. v. United States*, (C.C.A.9) 8 F.(2d) 324, 325 (alteration); *The ETRURIA*, (C.C.A.2) 147 F. 216, 217 (inserted entry); *Pennell v. U.S.*, (D.C.) 162 F. 64, 70 (absence of entry); *The SICILIAN PRINCE*, (D.C.) 128 F. 133, 136, 137; *The RICHMOND*, (D.C.) 114 F. 208, 212; *Bunge v. The UTOPIA*, (D.C.) 1 F. 892, 908, 913 (failure to produce scrap log and contradiction between log and witnesses). In *The CORINTHIAN*, 11 Asp. Maritime Cases (N.S.) 208, 211, an English judge says: '***Once you find there has been tampering with a log, as I have had occasion to say before in other cases, the court at once looks with suspicion at the whole matter.' "

The original record establishes a guilty state of mind on the persons in control of the EXXON BALTIMORE which leads to the conclusion that the EXXON BALTIMORE caused the collision. The conclusion to be drawn from the alteration of the records should be the conclusion of this Court.

In *O/Y Finlayson*, *supra*, on the question of "errors" in log books, this Court had this to say,

"....Accepting the master's explanation as to the source of the errors (dropping the flashlight) such subsequent actions hardly square with our

notions of the importance of the vessel's logs or the necessity that they speak, or at least are thought to speak, the truth as the lines are written and subscribed. *GEORGIAN* (5 Cir.), 1935 AMC 556, 558, 76 F.(2d) 550, 551." 259 F.2d at 16.

We have found no admiralty case in which there were alterations to the bell book and/or log book which ever reached the Supreme Court.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Steamboat Company and
Robert E. Lee, Inc.,
Petitioners

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APPENDIX "A"

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 81-3743

NEW ORLEANS STEAMBOAT CO.,
Plaintiff-Appellee
Cross-Appellant,

versus

M/T EXXON BALTIMORE, *in rem*,
and EXXON CORP.,
Defendants-Appellants
Cross-Appellees.

EXXON CORPORATION,
Plaintiff-Appellant
Cross-Appellee,

versus

THE STEAMBOAT NATCHEZ, her
engines, boilers, ETC., ET AL.,
Defendants-Appellees
Cross-Appellants,

**Appeals from the United States District Court for the
Eastern District of Louisiana**

**ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC**

(Opinion December 27, 1982, 5 Cir., 1983, __ F.2d __).

(FEBRUARY 7, 1983)

Before CLARK, THORNBERRY and POLITZ, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

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APPENDIX "B"

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 81-3743

NEW ORLEANS STEAMBOAT CO.,

**Plaintiff-Appellee
Cross-Appellant,**

versus

**M/T EXXON BALTIMORE, *in rem*,
and EXXON CORP.,**

**Defendants-Appellants
Cross-Appellees.**

EXXON CORPORATION,

**Plaintiff-Appellant
Cross-Appellee,**

versus

**THE STEAMBOAT NATCHEZ,
her engines, boilers, Etc., ET AL.,**

**Defendants-Appellees
Cross-Appellants.**

**Appeals from the United States District Court
for the Eastern District of Louisiana**

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(DECEMBER 27, 1982)

Before CLARK, Chief Judge, THORNBERRY and
POLITZ, Circuit Judges.

PER CURIAM:

Substantial credible evidence supports the findings
of fact made by the district court. AFFIRMED. See Local
Rule 21. McAllister v. United States, 348 U.S. 19, 75 S.Ct.
6, 99 L.Ed. 20 (1954).

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS STEAMBOAT COMPANY
and ROBERT E. LEE, INC. CIVIL ACTION

VERSUS NO. 80-1529

M/T EXXON BALTIMORE, *in rem* SECTION "F"
and EXXON TRANSPORTATION COMPANY,
in personam

CONSOLIDATED WITH:

EXXON CORPORATION CIVIL ACTION

VERSUS NO. 80-1647

THE STEAMBOAT NATCHEZ, SECTION "F"
her engines, boilers, etc. and
NEW ORLEANS STEAMBOAT COMPANY

This matter was tried to the Court on a former date as a difurcated trial on the question of liability; the issue of damages having been reserved for trial at a later date. After careful consideration of the evidence and the briefs of counsel, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

I.

On March 29, 1980 New Orleans Steamboat Company was a corporation organized and existing under the laws of the State of Louisiana within the jurisdiction of

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this Court and was the owner and operator of the Steamer *NATCHEZ*.

II.

On March 29, 1980, Exxon Corporation was a foreign corporation doing business on navigable waters within the territorial limits of the State of Louisiana, within the jurisdiction of this Court, and was the operator of the S/T *EXXON BALTIMORE*.

III.

This suit involves a collision which occurred in the Mississippi River at the Port of New Orleans directly below the Greater New Orleans Mississippi River Bridge, between the Steamer *NATCHEZ* and the S/T *EXXON BALTIMORE*. The collision occurred at approximately 4:35 p.m. on March 29, 1980. Now after five days of trial, with contradictory testimony and many exhibits, this Court must decide what actually happened on the afternoon of the collision. As is usually the case, the testimony of the two vessels in collision differs so radically that it is almost impossible to reconcile. Fortunately for the Court in this suit, several independent witnesses were called to testify on behalf of both parties.¹

¹ The testimony of the following independent witnesses, all licensed pilots and experienced navigators who operated daily in the very area of the Mississippi River in which this collision occurred, was relied upon by the Court as further pointed out in the opinion: Captain Michael D. Henson, the operator of the Governor Nicholls Traffic Light; Captain James M. Taylor, Master of the tug *J. A. BISSO, II*; Captain Albert A. Lasseigne, Master of the tug *FORT PIKE*; Captain James Paul Rivero, Master of the tug *M/V KELLEY*; Captain John J. Hohensee, Master of the tug *EDWARD LUCHENBACH*; and Captain Don J. Rider, Pilot of the vessel *M/V KOTOR*.

IV.

On the afternoon of March 29, 1980, the Mississippi River was rising and measured 13.3 feet on the gauge at the foot of Carrollton Avenue. When the river reaches 8 feet on the Carrollton gauge on a rising stage, and until the gauge reads 9 feet on a falling stage, the United States Coast Guard activates the Vessel Traffic Service (VTS), a traffic control system for vessels navigating in the vicinity of Algiers Point. All tugs with tows and all ships, whether under their own power or in tow, are subject to the system with the exception of tugs or towboats without tows or river craft of comparable size and maneuverability operating under their own power.²

V.

The VTS provides for red and green traffic lights located atop the Governor Nicholls Street Wharf and atop the levee at the foot of Ocean Avenue in Gretna, manned by United States Coast Guard licensed pilots. On March 29, 1980 Captain Michael D. Henson was in charge of coordinating traffic from the Governor Nicholls Traffic Control Light Tower and Captain Marion W. Short was manning the tower in Gretna. At the pertinent time, the Governor Nicholls light was displaying its green beacon down-

² Title 33 C.F.R. §§161.401 et seq. (1980). Specifically, Title 33 C.F.R. §161.402(b)(1) provides:

"When the Mississippi River reaches 8 feet on the Carrollton Gauge on a rising stage, and until the gauge reads 9 feet on a falling stage, the movement of all tugs with tows and all ships, whether under their own power or in tow, *but excluding tugs or towboats without tows or river craft of comparable size and maneuverability operating under their own power*, in the vicinity of Algiers Point shall be governed by red and green lights..." (emphasis added).

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stream, indicating permission for upbound vessels to transit Algiers Point. All descending vessels subject to the VTS were prohibited from proceeding below the lower end of Julia Street Wharf because the red beacon was being displayed upriver by the Gretna light. At all pertinent times the current was flowing at a speed of approximately 5 miles per hour.

VI.

The Steamer *NATCHEZ* is a steel hulled sternwheel passenger excursion vessel. Her gross tonnage is 1,384, and her dimensions are: length 265 feet overall, breadth 40 feet at the waterline, she draws 5.5 to 6.5 feet, and is equipped with double expansion steam engines totalling 150 horsepower, triple rudders, and a bow thruster. On the afternoon of March 29, 1980, the *NATCHEZ* was under the command of Captain Charles C. Hawley and the vessel's navigation was under the direction of Pilot William L. Heuer, Jr.

VII.

The S/T *EXXON BALTIMORE* is a steam tanker owned by Exxon Transportation Company and operated by Exxon Corporation with her homeport at Wilmington, Delaware. She is a 19,000 shaft horsepower, 50,311 dead weight ton tanker, 743 feet long, 103 feet wide and was at all pertinent times drawing 39 feet. The *EXXON BALTIMORE* was engaged in an upriver passage enroute to Baton Rouge, Louisiana on a voyage from the Republic of Panama carrying a cargo of 48,000 tons of Alaskan crude oil. Her gross tonnage is 29,068, and her displacement tonnage on March 29, 1980, in a fully loaded condition of North Slope Alaskan crude oil, was 63,100 tons. On

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the afternoon of March 29, 1980 the *EXXON BALTIMORE* was under the command of Captain John M. Spear, and Captain Tilman J. Pizani was the compulsory State pilot directing the navigation of the vessel during her upriver passage of the Mississippi River from Mile 91.5 A.H.P. to the Port of Baton Rouge.

VIII.

At approximately 2:55 p.m. on March 29, 1980, the *NATCHEZ* departed the Toulouse Street Wharf with 337 passengers and 40 crewmembers aboard on her 4778th excursion voyage of the New Orleans Harbor. The *NATCHEZ* proceeded downriver and at approximately 3:20 p.m. in the area of the Chalmette Monument turned around and proceeded upriver, passing the *EXXON BALTIMORE* while the latter was awaiting clearance from Captain Henson, stationed at the Governor Nicholls Traffic Control Light Tower, to navigate Algiers Point. After rounding Algiers Point, the *NATCHEZ* proceeded upriver favoring the New Orleans or left descending bank of the river to a point just below the Jackson Avenue—Gretna Ferry Crossing where she turned around in order to return to her landing at the foot of Canal Street.

IX.

The *NATCHEZ* first attempted to turn around by applying left rudder. This original attempt to top around, however, was unsuccessful and she was forced to back in a complete circle with her stern towards the right descending bank. This maneuver was observed by the Master of the *M/V JOHN STONE* who was so concerned that he asked the *NATCHEZ* whether she was encountering any difficulty. At no time during this maneuver did the *NATCHEZ*

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communicate her intentions or position to any other vessels in the vicinity. The *NATCHEZ* had not communicated with the U.S. Coast Guard Vessel Traffic Service since 3:20 p.m. when she turned at Chalmette slip nor did she communicate with the Governor Nicholls Traffic Control Light Tower at any time during her afternoon voyage.

X.

After the *NATCHEZ* had completed her rounding maneuver just below the Jackson Avenue Ferry, she proceeded downriver past the Gretna Traffic Control Light Tower, manned by Captain Short, where she was seen by him abeam of his tower and approximately mid-river. Captain Henson, stationed at the Governor Nicholls Traffic Control Light Tower, used his 'hot line' telephone to call Short and ask him to contact the *NATCHEZ* by radio and tell her of the upbound *EXXON BALTIMORE*. Henson used the 'hot line' telephone, as VHF radio conditions that afternoon were very bad. Captain Short attempted to contact the *NATCHEZ* on VHF 67, the mandatory designated bridge to bridge radio frequency for the Mississippi River through New Orleans; however the *NATCHEZ* did not respond for the very same reasons Short and Henson had to use their telephone. The *NATCHEZ* was equipped with one radio capable of reception and transmission and had another radio capable of reception only.

XI.

After the *NATCHEZ* passed the Gretna Traffic Control Light Tower, she entered a heavy rain squall which severely restricted the visibility ahead of those aboard her; however, at no time during this squall did either Captains

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Hawley or Heuer monitor the operable radar. The *NATCHEZ* was proceeding downbound at about mid-river 'shaping the bank' at half speed, which translated on this day to a speed of approximately 11 to 12 miles per hour over the bottom downbound considering the 5 mile per hour current under foot. The *NATCHEZ* continued at this rate of speed until just seconds before collision.

XII.

The *EXXON BALTIMORE* had changed compulsory port pilots in the vicinity of Chalmette ship at approximately 3:25 p.m. Captain Henson instructed the *EXXON BALTIMORE* to hold her position below Algiers Point to await the green light. At approximately 4:13 p.m., Captain Henson cleared the *EXXON BALTIMORE* to navigate around Algiers Point and proceed upriver. The *EXXON BALTIMORE* was unable to contact Governor Nicholls by radio on Channel 67, as some other ship had her transmitting key stuck in the down position. The pilot called VTS on Channel 11 and asked them to inform the Governor Nicholls Traffic Control Light Tower that he was proceeding. Pilot Pizani ordered full ahead to navigate that reach of the river along the Governor Nicholls Street Wharf. Full ahead on this particular trip called for a shaft speed of 85 rpm's. Algiers Point is a tight left hand bend (when upbound) and is considered one of the most dangerous bends in the river. The *EXXON BALTIMORE* was accelerating as she proceeded around Algiers Point and then upriver and at all pertinent times was traveling at a speed of approximately 10 to 11 miles per hour over the bottom.

XIII.

On the afternoon of March 29, 1980, the weather was overcast and raining, with occasional severe isolated thunderstorms producing strong winds and heavy rain. Three and one-half inches of rain fell during the day: in the afternoon alone, between 4:00 and 5:00 o'clock, one and one-half inches of rain fell, considerably limiting visibility at times between the Governor Nicholls and Gretna Traffic Control Light Towers. The evidence clearly demonstrates that there was heavy rain in the area of the collision. The various witnesses to some extent contradicted each other relative to the location of the heavy rain squall, its direction, the density of the rain and the manner in which it affected navigation. Visibility in the vicinity of Algiers Point on this day was generally $1\frac{1}{2}$ to 2 miles. The Court is of the opinion however that, although the rain may have been light at times, and visibility clear at times, there was a heavy rain squall above the bridge ahead of the *EXXON BALTIMORE* just prior to the collision and that it actually obscured visibility. Visibility was limited to less than three-quarters of a mile ahead for those on board the *EXXON BALTIMORE* and was completely blocked ahead of those on board the *NATCHEZ*.

XIV

At 4:28 p.m., as the *EXXON BALTIMORE* was abeam of the Canal Street ferry landing, maintaining a course about mid-river, this heavy rain squall was observed both visually by the *EXXON BALTIMORE*'s bridge personnel and on both radars on her bridge. When the *EXXON BALTIMORE* was approximately $\frac{3}{8}$ mile below the bridge, a radar target was noted in the rain squall at a range of approximately $\frac{3}{4}$ mile, bearing nearly head on of

the *EXXON BALTIMORE*. At approximately 4:31 p.m., the downbound *NATCHEZ* was visually sighted by the *EXXON BALTIMORE*'s look out and by her chief officer, also stationed on the bow. The *NATCHEZ* was simultaneously sighted by Pilot Pizani, Master Spear and the watch officer of the *EXXON BALTIMORE*'s bridge. At sighting, the *NATCHEZ* was nearly head to head with the *EXXON BALTIMORE* and was positioned just upstream of, and approximately mid-river off, the Perry Street Wharf, located on the right descending bank of the river and at a point approximately 3/8 miles above the Greater New Orleans Bridge.

XV.

Upon sighting the *NATCHEZ*, Pilot Pizani of the *EXXON BALTIMORE* immediately sounded one blast on the ship's whistle, indicating her intention to meet the downbound vessel port to port, and simultaneously ordered the helmsman to give her 10 degrees right rudder. This was done before anyone on the *EXXON BALTIMORE* had heard any whistles from the *NATCHEZ* indicating her assent to the port to port passing. The one whistle blast was sounded at approximately 4:32 p.m. and, approximately 10 seconds later, the *NATCHEZ* sounded a two whistle blast. Subsequent to the *NATCHEZ*'s two whistle passing signal, the *NATCHEZ* altered her course to port. Shortly thereafter the *EXXON BALTIMORE* sounded the danger signal and again proposed the port to port passing by blowing an additional one whistle signal. Almost simultaneously with the *EXXON BALTIMORE*'s danger signal, the *NATCHEZ* also sounded her danger signal.

There was conflicting testimony concerning what signals were actually sounded by the two vessels and when they were sounded. The witnesses on board the *EXXON BALTIMORE* claim that they blew one whistle first. The witnesses on board the *NATCHEZ* claim they blew two whistles first. Furthermore, those on board the *NATCHEZ* denied hearing any whistle signals from the *EXXON BALTIMORE* until just prior to the collision when, as they testified, the *EXXON BALTIMORE* sounded a four blast danger signal simultaneously with the *NATCHEZ*'s sounding of her danger signal. Notwithstanding this conflicting testimony, the testimony of Captain James M. Taylor, Captain James Paul Rivero and Captain Don J. Rider, all independent witnesses, supported that of those on board of the *EXXON BALTIMORE*. Accordingly, the Court finds that, as a matter of fact, a one whistle blast was sounded by the *EXXON BALTIMORE* first when the two vessels were approximately three quarters of a mile apart and the *NATCHEZ* had just come out of the heavy rain squall. We further find that the *NATCHEZ* sounded a two blast signal approximately 10 to 20 seconds later and the *EXXON BALTIMORE* and the *NATCHEZ* almost simultaneously sounded danger signals shortly thereafter.

XVII.

There is no explanation why the *NATCHEZ* did not hear the *EXXON BALTIMORE*'s one whistle signal as others in the area did, especially since her crew testified that they saw the *EXXON BALTIMORE* long before the whistle signals were sounded. Either the *NATCHEZ* was grossly and negligently blase' as she approached the up-bound loaded tanker in a high river with swift current and

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stormy weather at a time when she was having difficulty seeing and maneuvering, or she did not see the *EXXON BALTIMORE* when her witnesses first claimed she did.

XVIII.

Upon sounding of the danger signal, Pilot Pizani ordered the helm of the *EXXON BALTIMORE* 20 degrees starboard. As the *EXXON BALTIMORE* was swinging from approximately 196 degrees true to 202 degrees true, the bow of the *NATCHEZ* struck the port bow of the *EXXON BALTIMORE* some 75 feet aft of her stem at an apparent angle of 55 degrees. The point of collision was approximately 400 feet downstream from the uppermost point of the left descending bank bridge pier, approximately 100 feet outward from the bridge pier toward the center line of the river.

XIX.

The reason given by those in charge of the navigation of the *NATCHEZ* for their decision to alter her course to port and attempt a starboard to starboard passing instead of a port to port passing was that they believed the course of the *EXXON BALTIMORE* to have been close to the west or right descending bank of the river while the course of the *NATCHEZ* was well over toward the east or left descending bank. Considering all the evidence, especially the testimony of Captain James M. Taylor, Captain Marion W. Short and Captain James Paul Rivero, all independent witnesses who plotted the courses of the vessels, this Court finds that the *EXXON BALTIMORE* was never so close to the west bank or the *NATCHEZ* so close to the east bank of the river as to present a course proper for a starboard to starboard passage. The

testimony of those on board the *EXXON BALTIMORE* and these independent witnesses placed the course of both vessels at the center, or slightly to the New Orleans side of the center, of the river from the time the *NATCHEZ* came out of the rain squall up until each vessel made their course changes. The Court finds that the course of both vessels was down the center, or slightly to the New Orleans side of the center, of the river.

XX.

The testimony, including that of Captain John T. Brechtel, who was called as an expert witness on ship piloting, was that the normal course for a vessel such as the *EXXON BALTIMORE*, heading upstream in that section of the river, is the centerline or slightly to the New Orleans side of the centerline of the river. The *EXXON BALTIMORE* was on this proper course. It was the *NATCHEZ* which was off of her normal course. The downbound *NATCHEZ* had been on her normal and proper course until attempting to turn around just below the Jackson Avenue —Gretna Ferry Crossing. Her attempt to top around was unsuccessful and she was forced to back around in a complete circle. This maneuver, along with the adverse effects of the high winds, the *NATCHEZ*'s shallow draft and high sail area, and the strong currents apparently caused the *NATCHEZ* to be closer to the middle of the river than was her usual custom. Those on the bridge of the *NATCHEZ* testified that they were proceeding up the east or left descending bank of the river. They may have thought they were on the east bank side but, if so, they were mistaken since the evidence is overwhelming that the *NATCHEZ* was proceeding down the middle of the river.

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XXI.

Shortly before impact, the *NATCHEZ* placed her engines full astern. The combined force of the impact and the effect of her engines going full astern caused the *NATCHEZ* to move away from the side of the *EXXON BALTIMORE* after initial impact, and there was no further contact between the vessels. The *EXXON BALTIMORE* continued ahead at full speed and as she passed clear of the bridge pier her helm was put hard to left. The *EXXON BALTIMORE* missed the bridge abutment by about only 10 feet.

XXII.

The *NATCHEZ* sustained damage to her bow and appurtenant structures but took on no water aft of her collision bulkhead. The *EXXON BALTIMORE* was holed in her port deep tank which immediately flooded, adversely affecting the handling of the vessel. At 4:58 p.m. the *EXXON BALTIMORE* was brought to anchor off the Harmony Street Wharf.

XXIII.

Immediate assistance was furnished to the *NATCHEZ* by several nearby harbor tugs dispatched to the scene by Captain Don Rider, a New Orleans-Baton Rouge pilot who was docking the M/V *KOTOR* at Thalia Street Wharf. With all machinery functioning, the *NATCHEZ* was escorted back to her landing at the Toulouse Street Wharf.

No personal injuries or loss of life were sustained aboard the *EXXON BALTIMORE*. Seven passengers and crewmembers aboard the *NATCHEZ* were reported to have suffered injuries of sufficient severity to incapacitate them for a period in excess of 72 hours. In addition, approximately 89 passengers reported injuries of lesser severity.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of this admiralty and maritime claim and venue is properly laid in the Eastern District of Louisiana.³

II.

The waters involved are governed by the Navigation Rules for Harbors, Rivers, and Inland Waters Generally, 33 U.S. Code, Sec. 154, *et seq.* and the Pilot Rules for Inland Waters, 33 C.F.R. §80, *et seq.* The Rules of the Road actually are statutes enacted by Congress; and the Pilot Rules for Inland Waters, although promulgated by the United States Coast Guard, have the force of the statute when not in conflict with the provisions of the former.⁴

III.

On March 29, 1980, the reach of the river in which

³ United States Constitution, Art.3, Sec.2; 28 U.S. Code, Sec. 1333; Rule 9(h) Federal Rules of Civil Procedure.

⁴ *Beldon v. Chase*, 150 U.S. 674 (1893).

this collision occurred was also governed by the Regulations concerning Algiers traffic lights, 33 C.F.R. §161.401 *et seq.*⁵ The *NATCHEZ* claims she is not required to observe these traffic lights because of her size and ease of maneuverability and was permitted to proceed down river in this case notwithstanding the *EXXON BALTIMORE* being allowed to proceed upriver by the Governor Nicholls Traffic Control Light Tower. The particular regulation (33 C.F.R. §161.402(b)(1)) excludes "tugs or towboats without tows or river craft of comparable size and maneuverability operating under their own power...." The *NATCHEZ*, however, never attempted to prove that she was of comparable size and maneuverability of a tug or towboat. Everyone who testified on behalf of the *NATCHEZ* simply stated that the *NATCHEZ* was exempt from the regulation. Even the two Coast Guard employees who operated the traffic control lights thought the *NATCHEZ* was exempt but they did not know why or how. Nonetheless, we hold that the New Orleans Harbor excursion boats should be exempt from the VTS and if they are not covered by this exemption they should be covered by another. The New Orleans Harbor excursion boats could not exist if they had to hold up their short excursions each time there was a red light on the river. This Court will take Judicial Notice of the fact that all the New Orleans Harbor excursion vessels are of comparable size to large tug boats. They generally maintain courses near the bank of the river and have been running these routes for many years without complying with this regulation. There has developed a local custom of noncompliance by these New Orleans Harbor excursion vessels of which every navigator in this area of the river is well aware. Accordingly, we find that the *NATCHEZ* was exempt from the regulation, be it by way of legislation or local custom.

⁵ *Supra*, n.2.

IV.

The Navigation Rules for Harbors, Rivers, and Inland Waters Generally, Article 18, Rule I (33 U.S. Code, Sec.203) provides in pertinent part:

“Rule I. When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other....”

Based on the facts of this case, the Court finds that the *EXXON BALTIMORE* and the *NATCHEZ* were in the proper position (head and head, that is, end on, or nearly so) to accomplish a port to port or one whistle passage and Article 18, Rule I, was applicable. The downbound *NATCHEZ*, however, did not properly navigate to accomplish the proper port to port passing. From the facts of this case, it is apparent that those charged with the navigation of the *NATCHEZ* realized that they were in a position much further toward the middle of the river than they had intended and rather than following the dictates of the Rules of the Road, the *NATCHEZ* attempted to force a starboard to starboard passing by attempting to cross the bow of the *EXXON BALTIMORE*. The *NATCHEZ*'s alteration of course to the port in contravention of Article 18, Rule I amounted to gross fault and was the major cause of the collision.

V.

Also of special application to the collision in this case

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is Article 16 of the Navigation Rules for Harbors, Rivers, and Inland Waters Generally (33 U.S. Code, Sec. 192) which reads in pertinent part:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

A speed is moderate which is chosen with prudent regard to the actual factors producing danger, such as visibility, maneuverability, and backing power of the vessel and traffic to be anticipated.⁶

VI.

Substantial traffic was to be anticipated by both vessels in this case. The Mississippi River, as it flows through the City of New Orleans, is one of America's busiest waterways. The New Orleans harbor is almost completely lined with wharves, three ferry crossings, shipyard facilities, barge fleeting operations, and industrial waterways which themselves feed large numbers of craft into this harbor. To this is added the very large tanker tonnage that passes through the harbor enroute to and from Baton Rouge and the many refineries upriver, and the many excursion vessels which travel the New Orleans Harbor. This reach of the river is only some 2,000 feet wide and only 1,500 feet wide at the Greater New Orleans Bridge.

VII.

As a result of this congestion, growing more so every

⁶ *St. Phillip Offshore Towing Co. v. Wisconsin Barge Lines, Inc.*, 466 FS 403 (ED La. 1979).

year, the Court finds that the greatest caution must be exercised by the masters and pilots of all ships traversing this waterway, more particularly those navigating large tankers carrying highly combustible petroleum cargoes and those navigating passenger vessels where the lives of several hundred people are in their hands. Each of the hazards referred to above have always required additional caution and care on the part of navigators, and when all are combined with the additional limitation of visibility caused by severe weather as occurred on the day of the collision, then the greatest of caution is clearly required.

VIII.

The *EXXON BALTIMORE* was required, considering these conditions, to proceed at a moderate speed. Nevertheless, after rounding Algiers Point, she proceeded all the way through collision at full speed ahead which gave her a speed over the bottom of approximately 10 to 11 miles per hour. This was clearly excessive considering the circumstances; thus she violated Article 16 of the Inland Rules.⁷

IX.

When Captain Pizani, pilot on board the *EXXON BALTIMORE*, spotted the *NATCHEZ* coming out of the rain squall at a distance of less than three quarters of a mile ahead he immediately blew one blast and ordered 10 degrees right rudder. It is apparent to the Court that Captain Pizani ordered the 10 degree right rudder immediately and before receiving an assent because he didn't have time

⁷ *Liner v. Mr. Lucky*, 275 FS 230 (ED La. 1967); *Valley Towing v. American Wheat*, 1978 AMC 2175 (ED La. 1977).

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to wait for one. He had to react immediately because his vessel was traveling at such an excessive rate of speed that he just didn't have adequate time to properly evaluate his situation.

X.

It is common practice among pilots on the Mississippi River in the vicinity of the New Orleans Harbor to allow excursion vessels such as the *NATCHEZ* to head down into the eddy that runs up the New Orleans bank of the river from the Governor Nicholls Street Wharf to the Greater New Orleans Bridge. This fact was testified to by Captains John J. Brechtel and Vern Streckfus, both expert pilots who also stated that this local custom is known by just about every pilot navigating this area of the river. Pilot Pizani admitted he was familiar with the fact that excursion vessels came headdown into this eddy in order to dock.

XI.

Once Pizani gave the order for a 10 degree turn, however, it was too late to check the swing with the strong current on their port bow as the *EXXON BALTIMORE* had responded very quickly to the 10 degree right rudder order. By then the *EXXON BALTIMORE* was swinging with the strong current on her port bow; to attempt to reverse her swing at that point might only have put her bow into the *NATCHEZ*. Pizani chose to try to get through between the *NATCHEZ* and the bridge pier at full speed ahead: he blew an alarm and repeated his previous one blast signal and ordered 20 degrees right rudder, causing his vessel to come dangerously close to the bridge and nearly causing the worst disaster this City could imagine. The mistake that Pizani made was blowing the one blast

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and going 10 degrees right before receiving an assent. Under the conditions which existed at the time, when the *EXXON BALTIMORE* saw the *NATCHEZ* she should have reduced her speed immediately, if not sooner, to something less than full ahead. When Pizani heard the two whistle blast from the *NATCHEZ* it was too late for him to change his course because his speed was so excessive.

XII.

This speed by the *EXXON BALTIMORE* of over 10 miles per hour over the bottom in restricted visibility and heavy traffic that existed at that time and place was grossly negligent and a statutory violation which this Court finds to be a proximate cause of the collision.

XIII.

While the *NATCHEZ* criticized the speed of the *EXXON BALTIMORE* prior to and at the time of the collision, which speed was clearly excessive, in fact, the speed of the *NATCHEZ* was just as excessive. From the time the *NATCHEZ* turned around just below the Jackson Avenue—Gretna Ferry Crossing until just seconds before the collision she was proceeding at approximately 11 to 12 miles per hour over the bottom, including that period of time when her visibility was said to have been completely obscured ahead by the heavy rain squall. We find that this speed was excessive considering the circumstances. The *NATCHEZ* failed to reduce to a moderate speed considering the heavy rain conditions and conditions of reduced visibility as required by Article 16.⁸

⁸ *Chattahoochee*, 173 U.S. 540, 548 (1899); *Silver Palm*, 1937 AMC 1427, 94 F.2d 754 (CA9-1937).

These statutory faults by the two parties place the burden on each of them to show that such faults not only did not, but also could not have contributed to the collision. *Pennsylvania*, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148 (1873). The Court is of the opinion that these statutory faults of both parties either could have been or were proximate causes contributing to the collision. The *NATCHEZ* has failed to sustain its burden of proof that its excessive speed and its maneuver to port to attempt an improper starboard to starboard passing were not a contributing cause of the collision. Likewise, the *EXXON BALTIMORE* has failed to sustain its burden of proof that her excessive speed was not a contributing cause of the collision. To the contrary, we find that had the two vessels been proceeding at a moderate speed or had the *NATCHEZ* navigated the proper port to port passing the collision could have been averted.

XV.

In addition to the aforesaid statutory faults, the *NATCHEZ* is guilty of the following additional faults and/or lack of prudence, all of which contributed to the collision: The *NATCHEZ* was aware of the *EXXON BALTIMORE* and her position in the river at the time she (*NATCHEZ*) entered the rain squall, according to her witnesses. She likewise knew she was in an area of heavy rain squalls and that she would have to cross over to the east bank (New Orleans side) in order to reach her Dock. It is inconceivable that under such circumstances, the *NATCHEZ* would continue without reducing speed, without establishing contact with the *EXXON BALTIMORE* to confirm a passing agreement contrary to the normal rules

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of the Road, or to even ascertain the exact position of the *EXXON BALTIMORE*, all of which contributed to and were proximate causes of the collision.

XVI.

Moreover, the *NATCHEZ* had a functioning radar but did not attempt to use it to locate the *EXXON BALTIMORE* while the *NATCHEZ* was within the rain squall. In this respect it is to be noted that the *EXXON BALTIMORE* was able to observe the *NATCHEZ* on her radar. Failure to utilize the radar which was available in this situation also amounts to fault.⁹

XVII.

Contemporaneous with the collision, the second officer on watch on the bridge of the *EXXON BALTIMORE* made the following entry in that ship's bridge bell book,

"1634 Struck vessel NATCHEZ".

At some subsequent time, the word "by" was inserted between the words, "struck" and "vessel NATCHEZ." Also following the collision, the pilot of the *EXXON BALTIMORE* radioed to the Vessel Traffic Service of the Coast Guard (VTS),

"Yeah, we just clobbered the NATCHEZ."

At trial however Captain Pizani claimed that he said,

⁹ *Continental Oil Co. v. M/S Glenville*, 1962 AMC 2311, 210 FS 865 (SD Tex. 1962); *Moran Scow Corp. v. SS Boston*, 1972 AMC 2027 (SD N.Y. 1972.)

"Yeah, we just clobbered with the NATCHEZ."

The *NATCHEZ* argues that these statements made at the time of the accident are correct statements of how the collision actually occurred.

XVIII.

While one can argue forever whether the *EXXON BALTIMORE* struck the *NATCHEZ* or the *NATCHEZ* struck the *EXXON BALTIMORE*, it seems clear that the bow of the *NATCHEZ* came into contact with the port side of the *EXXON BALTIMORE* some seventy feet aft of her stem. This indicates that the *NATCHEZ* struck the *EXXON BALTIMORE* by running her bow into the side of the *EXXON BALTIMORE*. Regardless, the vessels came together simultaneously. The obvious result of these vessels colliding is that the smaller vessel was 'clobbered'. While Pilot Pizani was confused about the exact words he used seconds after the collision, the mistake was unimportant. That the larger did 'clobber' the smaller one certainly is no indication of fault on the part of either vessel or of anything else.

XIX.

The *NATCHEZ*'s accusation that Exxon altered her bell book also encounters problems. There was no alteration, no erasure, no substitution or strikeover of a single word in the bell book, or anything which in any way obscured that which was originally written.¹⁰ Second Officer Missud simply added the preposition 'by' with appro-

¹⁰ Griffin, *The American Law of Collision*, p.638; *The Chicago*, 1937 AMC 1427, 94 F.2d 754 (CA9-1937).

priate symbol, obvious to one and all that it was a later addition, added to cause the bell book to reflect what her master believed to be correct. This was a freely admitted correction, made for an understandable reason and without any effort of subterfuge. The original entry was considered by Captain Spear, and upon reflection by Second Officer Missud, to have been inaccurate. Inserting the preposition 'by' leaves clear for all to see that the word was a later insert and did not obscure or make unclear the original entry. If the mistake on Captain Pizani's part in thinking that he used one word—'with'—which he in fact did not use—seconds after a collision, and the insertion of the word "by" in the bell book is worthy of mention, how much more credibility then must be given the log entry written by Captain Hawley after the *NATCHEZ* had anchored at her dock, long after the collision. The elaborate page long work of calligraphy by Captain Hawley clearly states "visibility no factor. Tanker in sight from frist sighting to collision." This *NATCHEZ* exhibit discredited Hawley's testimony as well as his fellow witnesses and supports the *EXXON BALTIMORE*'s witnesses.

XX.

In summary, the Court finds that the *NATCHEZ* was coming downriver toward the Greater New Orleans Bridge making her 4,778th approach to her landing. She was traveling somewhat in the middle of the river. The *NATCHEZ* had just come out of a rain storm and sighted the *EXXON BALTIMORE* approximately three-quarters of a mile away from her and she attempted to cut across the bow of the *EXXON BALTIMORE* in order to head into the eddy to make her normal landing. This Court will never understand why Captain Hawley and Captain Heuer, with seventy years of experience between them, with thou-

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sands of miles of pilotage on their licenses, with immaculate career records and with the lives of 377 people in their hands, deliberately ignored the rules of the road which they have lived by for so long and, in bad weather with poor visibility, at an excessive rate of speed, turned hard left and attempted to cut across the bow of a 743 foot, 63,100 ton fully laden oil tanker which they might have easily avoided, in order to make a passing against the Rules of the Road without first securing an assent.

XXI.

It is obvious to this Court that the *NATCHEZ* was definitely the more maneuverable vessel and could have turned to her starboard to effect the required port to port passing at almost any time up until the moment of impact. The *EXXON BALTIMORE* did not reduce her speed or further alter her course until just after the collision. Then, when it was certain that the bow of the *EXXON BALTIMORE* would clear the bridge pier, her helm was put hard to port to swing her stern to starboard in an effort to clear the *NATCHEZ*. In fact, the Court finds that if the *EXXON BALTIMORE* had reduced her speed at all, or turned to port any earlier, since the *NATCHEZ* maintained her improper course, that would probably have caused the *EXXON BALTIMORE* to strike the *NATCHEZ* broadside, rolling the *NATCHEZ* over or cutting her in half with disastrous consequences for the 377 passengers.

XXII.

It is apparent to the Court that those in charge of navigation of the *NATCHEZ* assumed that the Pilot of the *EXXON BALTIMORE* would be solicitous of the needs of a downbound passenger excursion vessel. Specifically, the

NATCHEZ believed the pilot of the *EXXON BALTIMORE* would see the *NATCHEZ* and know that she would be asking for a two whistle passing under the bridge. In this case however the *EXXON BALTIMORE* was traveling at a high rate of speed in an area of limited visibility and had not the time necessary to rectify the 10 degree turn which she immediately made. Upon sighting the *NATCHEZ* coming out of the rain squall Pilot Pizani acted immediately, blowing one whistle and, before receiving an assent, turned right at full speed ahead to accomplish a port to port passing which the rules of the road called for in this meeting situation. This maneuver caused the *EXXON BALTIMORE* to miss the bridge abutment on her starboard side by a margin of only 10 feet and imperilled the Greater New Orleans Bridge, the people of the City, and the entire water front. The navigation of the *EXXON BALTIMORE* exemplified the folly of excessive and wholly unnecessary speed under any conditions which demanded caution.

XXIII.

Having determined that both the *NATCHEZ* and the *EXXON BALTIMORE* were at fault, we must now, under the mandate of *United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397, 1975 AMC (1975), determine the percentage of fault of each party. The Court has taken into consideration all of the matters set forth and, where appropriate, has considered such in determining fault herein, and has ignored same to the extent that they do not bear upon fault.

XXIV.

By its very nature, reducing contributory fault to a

mathematical formula is a difficult task. Here, we find that the gross negligence of the *NATCHEZ* in altering her course to port when it was clear a port to port passing was called for, without any attempt to communicate her intentions to the *EXXON BALTIMORE* to pass contrary to the rules of the road, and her excessive speeding under the conditions that existed, was the major cause of the accident. While the fault of the *EXXON BALTIMORE* in traveling under the condition that existed at an excessive rate of speed was somewhat less in comparison with the fault of the *NATCHEZ*, it was, nevertheless, also a contributing cause of the collision. Accordingly the Court finds that this collision occurred as a result of sixty percent (60%) fault on the part of the *NATCHEZ* and forty percent (40%) fault on the part of the *EXXON BALTIMORE*.

XXV.

Accordingly, a judgment will be entered as to the liability aspect of this case, indicating sixty percent (60%) fault on the part of the *NATCHEZ* and forty percent (40%) on the part of the *EXXON BALTIMORE*. The parties shall inform the Court within twenty-one days as to whether or not they can agree upon their respective provable damages, and, if not, the Court will set a date for trial as to such.

New Orleans, Louisiana, this 13th day of November, 1981.

UNITED STATES DISTRICT JUDGE